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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARTIN MOYEDA,

Plaintiff and Appellant,

v.

JESUS OJEDA,

Defendant and Respondent.

B286301

(Los Angeles County
Super. Ct. No. BC617696)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Reversed and remanded. Robert D. Lipscomb for Plaintiff and Appellant. John F. Bazan for Defendant and Respondent.

I. INTRODUCTION

Plaintiff Martin Moyeda, dba Sound Music Records, appeals the judgment dismissing this action without prejudice. The trial court granted defendant Jesus Ojeda's motion for judgment on the pleadings for failure to pursue an administrative determination with the Labor Commissioner (the Commissioner) under the Talent Agencies Act (Lab. Code, § 1700 et seq.) (the Act). Plaintiff contends the Act did not require him to exhaust administrative remedies and the trial court should have stayed, rather than dismissed, his action. We reverse and remand.

II. BACKGROUND

On April 20, 2016, plaintiff filed a complaint for breach of contract, fraud, unfair business practices, and injunctive relief. The complaint alleged plaintiff, a music promoter and manager, entered into a contract with defendant, a musician, to manage "all aspects of defendant's live and recorded musical performances in the United States." According to plaintiff, defendant fell behind in making contractually-required payments. Plaintiff claimed defendant breached the contract and engaged in unfair business practices by failing to pay for plaintiff's services and committed fraud by falsely telling plaintiff he would make the payments. Plaintiff sought an injunction prohibiting defendant from performing without paying plaintiff.

Defendant filed his answer on August 5, 2016, asserting among other defenses that the court did "not have standing to hear the issue pursuant to Labor Code, [s]ection 1700.44(a)" and did "not have jurisdiction as the Labor Board has exclusive

jurisdiction under Labor Code, [s]ection 1700, et seq.” (Emphasis omitted.)

On May 23, 2017, defendant filed a motion for judgment on the pleadings arguing the Commissioner had exclusive jurisdiction under the Act. Plaintiff countered defendant had waived this defense by not initiating a proceeding with the Commissioner, and that at most the trial court should stay the case pending a determination by the Commissioner.

After supplemental briefing, the trial court found plaintiff had failed to exhaust his administrative remedies, granted the motion for judgment on the pleadings, and dismissed the action without prejudice. The court declined to stay the action because the parties could appeal the Commissioner’s determination to the superior court and because plaintiff had made no effort to refer the matter to the Commissioner. Instead, the court stated, “[p]laintiff’s efforts herein to date have worked at cross-purposes with [the] remedial purpose [of judicial economy] that is inherent in the administrative process.” The trial court was concerned that plaintiff would not pursue the required administrative remedy expeditiously if the case were stayed. The trial court did not decide whether defendant had waived the exhaustion defense, concluding “unless and until an administrative proceeding is instituted before the Labor Commissioner, there can be no determination of claims or defenses.”

On September 8, 2017, after the trial court’s ruling on the motion for judgment on the pleadings, plaintiff filed with the Labor Commissioner a petition to determine controversy.

On September 21, 2017, the trial court entered judgment for defendant, and plaintiff then timely appealed.

III. DISCUSSION

A. *Standard of Review*

“We apply a de novo standard of review to the legal question of whether the doctrine of exhaustion of administrative remedies applies in a given case. [Citations.]’ [Citation].” (*Defend Our Waterfront v. State Lands Com.* (2015) 240 Cal.App.4th 570, 580.) “A demurrer may properly be sustained based on the failure to adequately plead exhaustion of administrative remedies. [Citation.] In order to withstand a demurrer for failure to allege exhaustion of available administrative remedies, the plaintiff must allege facts showing that he did exhaust administrative remedies or facts showing that he was not required to do so.” (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156.)

“Review of an order granting a motion for judgment on the pleadings is governed by the same standard applicable to reviewing an order sustaining a general demurrer. . . . A defendant is entitled to a judgment on the pleadings when it appears from the face of the complaint (or on those matters judicially noticed) that the complaint is barred as a matter of law. [Citation.] We review the pleadings de novo to determine whether the trial court erred in granting the motion. [Citation.]” (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1476.)

B. *Talent Agencies Act*

The Act, codified in Labor Code sections 1700 to 1700.47, governs the representation of artists, including by certain managers. (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 984 (*Marathon*); *Blanks v. Seyfarth Shaw LLP*

(2009) 171 Cal.App.4th 336, 359.) “The Labor Commissioner has original and exclusive jurisdiction over issues arising under the Act. [Citations.]” (*Marathon, supra*, 42 Cal.4th at p. 981, fn. 2.) All cases arising under the Act “must be ‘refer[red]’ by the parties to the Labor Commissioner (Commissioner) for resolution.” (*Styne v. Stevens* (2001) 26 Cal.4th 42, 46 (*Styne*).) Resort to the Commissioner “is a ‘jurisdictional’ prerequisite to judicial consideration of the claim.” (*Id.* at p. 55.)

In *Styne, supra*, 26 Cal.4th 42, the Supreme Court addressed the situation where a plaintiff files a breach of contract case without reference to the Act and the defendant asserts defenses under the Act. The Supreme Court held that if the defendant has a “colorable defense under the Act,” the defendant “is entitled to maintain her Act-based defense, though it must be pursued in the first instance before the Commissioner.” (*Id.* at p. 48.) The “general principle that the requirement of exhaustion of administrative remedies applies to defenses” also applies to Act-based defenses. (*Id.* at p. 57.) Requiring actions based on defensive, as well as affirmative, invocations of the Act to first be submitted to the Commissioner “serves the intended purpose of the doctrine of exhaustion of administrative remedies—to reduce the burden on courts while benefiting from the expertise of an agency particularly familiar and experienced in the area.” (*Id.* at p. 58.) The court explained, “the appropriate course is simply to stay the superior court proceedings and file a ‘petition to determine controversy’ before the Commissioner.” (*Ibid.*)

The parties may appeal the Commissioner’s decision to the superior court for a de novo review within ten days after service of notice of the decision. (*Styne, supra*, 26 Cal.4th at p. 46; *Sinnamon v. McKay* (1983) 142 Cal.App.3d 847, 853; Lab. Code,

§ 1700.44, subd. (a).) The appealing party may file “a separate, independent action for review under section 1700.44, subdivision (a),” or may file for review in a superior court action that has been stayed pending the Commissioner’s decision. (*Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1098-1099 (*Yoo*).)

C. *The Trial Court’s Decision to Dismiss the Action*

Plaintiff argues the trial court erred in dismissing his complaint because the Act does not require him first to obtain a determination by the Commissioner before seeking a remedy in the superior court. To the contrary, that is exactly what the Act requires for “all claims or defenses which *colorably* arise under the Talent Agencies Act.” (*Styne, supra*, 26 Cal.4th at p. 59, fn. 10 [“we use the term ‘colorable’ in its broadest sense”].) “Disputes *must* be heard by the Commissioner, and all remedies before the Commissioner *must* be exhausted before the parties can proceed to the superior court.” (*Id.* at p. 54.) Even the issue whether the Act applies to a particular dispute is resolved “in the first instance” by the Commissioner. (*Id.* at p. 55, fn. 6.)

All of plaintiff’s causes of action are based on a contract for plaintiff to manage “all aspects of defendant’s live and recorded musical performances in the United States.” Thus, the matter “plausibly pertains to the subject matter of the Act”—the regulation of “persons or corporations that procure professional ‘employment or engagements’ [citation] for creative or performing ‘artists’ [citation] in the entertainment media.”¹ (*Styne, supra*, 26

¹ An example of a claim that “has *nothing to do* with the Act” and would not need to be referred to the Commissioner is “an automobile collision suit between persons unconnected to the

Cal.4th at pp. 46, 59, fn. 10.) While plaintiff argues the Act does not apply because he does not seek compensation for procuring employment for defendant, that “is precisely the sort of issue that the Talent Agencies Act commits in the first instance to the exclusive jurisdiction and special competence of the Commissioner.” (*Id.* at p. 61.)

Plaintiff next argues, pursuant to *Styne, supra*, 26 Cal.4th 42, that the trial court should have stayed his action pending a determination by the Commissioner, rather than dismiss the action without prejudice.

The court in *Styne, supra*, 26 Cal.4th 42, clarified that the Act does not place the burden of initiating administrative action solely on plaintiffs. It also requires defendants to refer defenses colorably arising under the Act to the Commissioner for resolution. (*Id.* at pp. 47 [colorable defenses “must first be referred to the Commissioner for resolution”] & 54 [“the parties involved *shall refer the matters in dispute* to the Labor Commissioner”].) *Styne* explained “the preferable procedure is for the party asserting the Act to seek a pretrial stay and referral.” (*Id.* at p. 60, fn. 11.) Thus, when a defendant claims the protection of the Act by asserting Act-based defenses, the defendant is to seek a stay of the court proceedings and a referral to the Commissioner. In that situation, staying the action and referring the defendant to the Commissioner for resolution of Act-based defenses comports with the Act and directions of *Styne* and should ensure the matter will be handled expeditiously.

entertainment industry.” (*Styne, supra*, 26 Cal.4th at p. 59, fn. 10.)

Plaintiff argues he is prejudiced by the dismissal, rather than stay, of his action because the statutes of limitations may run on his contract and fraud claims before the Commissioner issues a determination. Neither party cites any authority on this point, and the Act does not expressly toll the time to bring a court action pending the administrative proceeding. However, the Supreme Court has expressly stated in the context of a different statutory scheme, “Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: ‘It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.’ [Citations.]” (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 101.) As explained above, exhaustion of administrative remedies is mandatory for claims and defenses colorably arising under the Act.

Nevertheless, dismissing the action when a defendant asserts Act-based defenses may prejudice the plaintiff. If the defendant does not initiate proceedings with the Commissioner, the plaintiff may not have the protection of equitable tolling. As plaintiff here complains, the plaintiff is then put in the position, to protect his or her rights, of affirmatively pursuing the administrative proceeding while simultaneously arguing the matter does not belong with the Commissioner. And a dismissal rather than a stay could prejudice the plaintiff if it is later determined that equitable tolling does not apply to all of the plaintiff’s claims, because for example, not all of the claims were

subject to administrative exhaustion. To avoid potential prejudice, a stay is necessary.

We reverse the judgment and remand for the trial court to stay the action. Because plaintiff apparently has already initiated proceedings with the Commissioner, referring defendant to the Commissioner may not be necessary here.

D. *Waiver*

Plaintiff also contends defendant waived his rights under the Act by litigating in court rather than immediately seeking a determination by the Commissioner. A defendant must plead defenses in an answer or demurrer, or risk waiver, unless the defendant objects that the court has no jurisdiction of the subject of the cause of action. (Code Civ. Proc., § 430.80, subd. (a).) Defendant asserted lack of jurisdiction under the Act in his answer.

Plaintiff cites no authority supporting his waiver argument, and the only cases considering waiver of Act-based defenses found no waiver. The court in *Yoo, supra*, 126 Cal.App.4th 1089, declined to find a waiver of an Act-based defense even though the defendant did not plead the defense in her answer. (*Id.* at p. 1103.) In *Styne, supra*, 26 Cal.4th 42, where the defendant's answer likewise did not assert an Act-based defense, the court rejected the waiver contention under the particular circumstances of that case. (*Id.* at pp. 48, 59, fn. 10.) Given the facts here, the Act's mandate that colorable claims and defenses be submitted to the Commissioner, and plaintiff's failure to submit his colorable claims to the Commissioner in the first instance, we decline to conclude a waiver occurred. (*Id.* at pp. 58-59.)

IV. DISPOSITION

The judgment in defendant's favor dismissing the complaint without prejudice is reversed. On remand, the court is to stay the action pending resolution of the Act-based defenses by the Commissioner. The parties are to bear their own costs on appeal.

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SEIGLE, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.